Jurisdictional Statement

81-1048

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

PETER S. RAZATOS,

Appellant,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Can an attorney, consistent with the demands of due process, be suspended from the practice of law and held to public obloquy on the basis of findings of a hearing panel of nine persons, where the issue of credibility is a critical factor, when only three of the nine members have heard the testimony and observed the witnesses and the other six have not even read a transcript of the proceedings?

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OPINION BELOW

The decision of the Colorado Supreme Court of June 22, 1981, affirming the report and adopting the recommendation of the Hearings Panel of the Grievance Committee of the Supreme Court of the State of Colorado to suspend appellant Razatos from the practice of law for a period of three years has not yet been reported. It is reproduced in Appendix A hereto, at pp. A-1–A-13.

JURISDICTION OF THIS COURT

This is an appeal from a decision of the Colorado Supreme Court of June 22, 1981, suspending appellant Razatos from the practice of law for a period of three years. The Colorado Supreme Court entered an order August 6, 1981, in which it denied a petition and amended petition for rehearing. This order is reproduced in Appendix B hereto, p. B-1. A notice of appeal was thereafter filed with the Colorado Supreme Court on October 21, 1981, and is reproduced in Appendix C hereto, p. C-1. On October 23, 1981, Justice White extended the time for filing this Jurisdictional Statement to and including December 4, 1981.

In the proceedings before the Colorado Supreme Court appellant challenged the constitutionality of Rules 249 and 251, Colo. R. Civ. P., as being contrary to the demands of the due process clause of the Fourteenth Amendment to the United States Constitution. This argument was not addressed in the Colorado Supreme Court's decision of June 22, 1981. Jurisdiction of this Court to review on appeal the sub silentio rejection by the Colorado Supreme Court of the constitutional challenge to the State of Colorado's disciplinary rules is conferred by 28 U.S.C. §1257(2). *In re Griffiths*, 413 U.S. 717 (1973).

RULES INVOLVED

Rule 249. Formal Hearings by Hearings Panel

All formal hearings shall be conducted by the Hearings Panel, a Hearings Committee consisting of at least three persons, composed of at least one member of the Hearings Panel and two or more members of the Bar, or a Hearings Committee composed of three or more members of the Hearings Panel. At formal hearings the witnesses shall be sworn and a complete record shall be made of all proceedings had and testimony taken. All such Hearings Committees shall be appointed by the Chairman of the Committee, and in appointing any such Hearings Committee, the Chairman shall designate one of the members thereof as the Hearings Chairman. At a hearing conducted by the Hearings Committee, the Hearings Chairman thereof shall act as presiding officer. He shall have authority to rule on all motions, objections, and other matters, presented in connection with such formal hearings.

Hearings on formal complaints shall be conducted in conformity with the Colorado Rules of Civil Procedure and the practice in the trial of civil cases except the respondent may not be required to testify over his objection.

Rule 251. Report, Findings, and Recommendations of the Hearings Committee

A. At the conclusion of a formal hearing before a Hearings Committee, a report shall be made setting forth findings and recommendations, which report shall be signed by the majority of the Hearings Committee and submitted to the Hearings Panel for its approval or disapproval. To warrant a finding of misconduct, the charges must be established by clear and convincing evidence. If the findings and recommendations are approved and signed by the majority of the Hearings Panel, it shall be and become the report of the Hearings Panel. Where hearing is had before the Hearings Panel, it shall make a report of its findings

and recommendations, which shall be approved and signed by a majority of the Hearings Panel.

B. If it shall be found that the charges are unfounded and unproven, the Hearings Panel shall enter its order dismissing the complaint, whereupon the matter shall be terminated; except that any person who has filed a complaint in the proceedings, who desires to have the matter of dismissal of the complaint reviewed by the Supreme Court, may petition the Court for such review. The petition shall state with particularity the facts which it is believed the Hearings Panel misapprehended or overlooked in reaching its determination, with reference to the pages in the record which will support the petition. The petition shall be accompanied by a full transcript of the proceedings which shall be prepared at the expense of the party petitioning for review.

C. If the Hearings Panel finds the charges proven and recommends discipline, it shall also recommend the extent thereof as:

(1) Letter of admonition. If the Hearings Panel shall determine that a letter of admonition is the appropriate disciplinary action, it is not required to recommend such action to the Supreme Court but may instead prepare and transmit such letter to the respondent.

(2) Private censure;

(3) Public censure;

(4) Suspension for a definite or indefinite period;

(5) Disbarment.

STATEMENT OF THE CASE

Pursuant to Rule 247, Colo. R. Civ. P., appellant herein, Peter Razatos, was formally charged with four counts of professional misconduct. Mr. Razatos duly filed an answer pursuant to Rule 248 denying the charges and the matter was referred to a three-member Hearings Committee for formal hearing, as required by Rule 249, set out above.

At the conclusion of the hearing the Hearings Committee submitted its report in which it found appellant guilty of the

charges and recommended three years' suspension from the practice of law. Then, pursuant to Rule 251, also set out above, these findings and recommendations were submitted for approval or disapproval to a nine-member Hearings Panel, of which the three-member Hearings Committee was a part.

A majority of the Hearings Panel approved the findings and recommendations of the Committee, which findings and recommendations then became the report of the Hearings Panel. Two members of the Panel, while concurring in the Committee's findings, dissented with respect to the recommended disciplinary action and recommended disbarment. The report of the Hearings Panel was then forwarded to the Colorado Supreme Court, which adopted its recommendations in its decision of June 22, 1981, the decision which is the subject of this appeal.

Without going into unnecessary detail, the charges of professional misconduct against Mr. Razatos all arose out of a transaction involving the purchase and sale of a bar to a Mrs. Smith, the complainant against Mr. Razatos in the disciplinary proceedings. Mr. Razatos, who is a licensed real estate broker as well as an attorney, has claimed that throughout the transaction in question he was not acting as Mrs. Smith's attorney but as a real estate broker and she could not reasonably have thought otherwise. Mrs. Smith, on the other hand, claims that throughout she reasonably thought Mr. Razatos was acting as her attorney. Her claim was supported by the testimony of an attorney referred to in the Colorado Supreme Court's decision as Mr. Black, who had an office- and fee-sharing arrangement with Mr. Razatos and who had been retained by Mrs. Smith to represent her at the closing. Mr. Black's relationship with Mr. Razatos was terminated in March of 1977 "as a result of disagreements." Decision of the Colorado Supreme Court, Appendix A, at A-7. Mr. Black thereafter assisted Mrs. Smith in requesting disciplinary action against Mr. Razatos. Mrs. Smith's claim that she reasonably thought Mr. Razatos was acting as her attorney also

received some slight support from the testimony of another attorney, Mr. Pollack, who was representing his father in the transaction, the landlord and lienholder.

In the words of the Complainants' Brief, at 3, "the cornerstone issue in this case is whether there was an attorney-client relationship between Razatos and Smith." This was echoed in the decision of the Colorado Supreme Court, Appendix A, at A-8–A-9, when it noted: "The basic finding, from which the conclusion of misconduct flows, is that the relationship between the respondent [Razatos] and Smith in the purchase of the Littleton Lounge was that of attorney and client."

At the hearing the undisputed testimony revealed that Mrs. Smith knew that Mr. Razatos was both an attorney and a real estate broker and that her last association with him as an attorney had been in 1969. It was conceded that she contacted Mr. Razatos in 1975, not as an attorney, but to see if he knew of any bars for sale. She further conceded that she knew Mr. Razatos was the attorney for parties about to initiate foreclosure proceedings on the bar she ultimately bought. It was also undisputed that it was Mr. Razatos' suggestion that Mrs. Smith be represented by counsel in forming The Spigot, Inc., the bar's corporate name, and at the closing. She then retained Mr. Black, who had previously represented her husband, to represent her. There was, of course, some testimony and evidence supporting Mrs. Smith's claim that she thought Mr. Razatos was acting as her attorney; but this is the undisputed setting in which this claim arose. Given this background, it is apparent that the credibility of the chief actors in this drama, Mr. Razatos, Mrs. Smith, and Mr. Black, is of critical significance in deciding, first, whether Mrs. Smith subjectively believed Mr. Razatos to be acting as her attorney and, second, whether under all the facts and circumstances such a belief, if held, was reasonable.

Although Mr. Razatos continues to deny vehemently that any attorney-client relationship existed between him and Mrs. Smith

during the transaction in question, he is here only challenging the constitutionality of the procedures by which such a finding was made. It is his claim that Rules 249 and 251 of the Colorado Rules of Civil Procedure, in permitting the Hearings Panel to find the existence of the relationship of attorney and client in this case, in which credibility is a critical factor, when only three members of the nine-person Panel had observed the witnesses and the remaining six did not even have access to a transcript, denies him due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

THE QUESTION PRESENTED IS SUBSTANTIAL

Whether an attorney, consistent with the demands of due process, can be suspended from the practice of law and held to public obloquy on the basis of findings of a hearing panel of nine persons, where the issue of credibility is a critical factor, when only three of the nine members have heard the testimony and observed the witnesses and the other six have not even read a transcript of the proceedings presents a most substantial question.

A. *The Hearings Panel has final responsibility for the findings of fact.*

In its brief before the Colorado Supreme Court, counsel for the People argued, at 3, that "Panel B [the Hearings Panel] was not an 'ultimate fact finder.' Their conclusions, if adverse to Respondent, are merely advisory. This Court will make the final decision in the case and it will have the benefit of a transcript and all exhibits." That simply is not the case. The Hearings Panel is the "ultimate fact finder."

First, the formal hearing, at the discretion of the Chairman of the Grievance Committee, could have been held before the full Hearings Panel. Rule 249, Colo. R. Civ. P. When, however, the hearing is held before a Hearings Committee, its report, setting forth its findings and recommendations, is submitted for

approval "*or disapproval*" to the Hearings Panel. "If the *findings* and recommendations *are approved* and signed by the majority of the Hearings Panel, it shall be and become the report of the Hearings Panel." Rule 251 A, Colo. R. Civ. P. (Emphasis added.) That the Panel had authority to disapprove the findings, as well as the recommendations, is made clear by the fact that in the dissenting opinion to the Panel report, authored and concurred in by members of the Panel who had not been members of the Committee, there appears the heading:

CONCURRENCE WITH FINDINGS
DISSENT AS TO RECOMMENDATION

The dissenters, who had not heard the testimony, obviously assumed the authority to have dissented both as to the findings and the recommendation.

Rule 251 C provides that "If the *Hearings Panel* finds the *charges proven*" it may recommend discipline it deems appropriate. Further, Rule 252 A directs the Hearings Panel, should it decide to recommend disciplinary action, to "promptly file with the Clerk of Court two copies of *its* report, *findings*, and recommendations." (Emphasis added.)

Lastly, Rule 251 B provides that in cases in which a Hearings Panel dismisses a formal complaint a disappointed complainant may, by the filing of a petition, seek review of the dismissal in the Colorado Supreme Court. The petition shall state with particularity the *facts* which it is believed the *Hearings Panel misapprehended or overlooked in reaching its determination . . . .*" (Emphasis added.)

It is unfortunate that the Supreme Court of Colorado chose not to address itself to appellant's constitutional argument since, had it done so, it might have clarified the relationship between the Hearings Committee, the Hearings Panel and the Supreme Court with respect to the final responsibility of finding the facts.

Having failed to do so, however, the Colorado rules should be interpreted in conformity with their clear wording and the construction placed upon them by those who administer them.

B. *The gravity of the interests affected and the nature of the proceeding require that very strict demands of due process be followed.*

It is conceded that one cannot be suspended from the practice of law except in accordance with due process. The right to engage in the practice of law is a recognized interest in liberty, *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), as is the right to be free from public stigma in conjunction with the loss of the right to practice. *Paul v. Davis*, 424 U.S. 693 (1976). Further, state bar disciplinary proceedings have been characterized as "quasi criminal" in nature, *In re Ruffalo*, 390 U.S. 544, 551 (1968), and enough like criminal proceedings to require federal abstention under the doctrine of *Younger v. Harris*, 401 U.S. 137 (1971). *Anonymous J. v. Bar Association of Erie County*, 515 F.2d 435 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975); *Goodrich v. Supreme Court of South Dakota*, 511 F.2d 316 (8th Cir. 1975); *Erdman v. Stevens*, 458 F.2d 1205 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). The importance of the interests to the attorney who is subject to disciplinary proceedings and the quasi criminal nature of the proceedings have been recognized by the State of Colorado, which has required that a charge of misconduct "must be established by clear and convincing evidence." Rule 251 A, Colo. R. Civ. P.

C. *Due process here requires the fact finders to personally observe the witnesses.*

In *Mathews v. Eldridge*, 424 U.. 319 (1976), this Court identified three factors to be taken into account in determining the nature of the process due in a particular case. They have been

recently restated in *United States v. Raddatz*, 447 U.S. 667, 677 (1980), as follows:

> (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve.

There can be no question that the private interests here implicated are deserving of very demanding procedural safeguards. Those safeguards which appellant asserts are required by due process are that when these private interests turn on the credibility of witnesses, as they unquestionably do in this case, that the fact finders personally observe the witnesses.

In the recent decision, *Califano v. Yamasaki*, 442 U.S. 682 (1979), in considering whether the Social Security Act required a personal hearing before overpayments could be recouped, this Court noted, at 697:

> We do not see how [fault] can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. See *Goldberg v. Kelly*, 397 U.S., at 269.

Although ultimately decided on statutory grounds, the statute was so construed to avoid the substantial constitutional question that a contrary construction would have invited, as the citation to *Goldberg v. Kelly*, 397 U.S. 254 (1970), suggests. *See also Gray Panthers v. Schweiker*, 652 F.2d 1980 (D.C. Cir. 1981),

relying on *Yamasaki* to find a personal hearing by the fact finder constitutionally compelled under similar circumstances.

It must be noted that the private interest implicated in *Yamasaki*, Social Security benefits, is not sufficiently important to require personal hearings in all circumstances, *Mathews v. Eldridge*, 424 U.S. 319 (1976). If, however, the interest is of sufficient importance to require such hearings when issues of fault, including credibility, are at issue, then the interest in practicing one's chosen profession and avoiding the public stigma of suspension must necessarily warrant at least as much. Even in *Yamasaki* written documentation was before the fact finder; but here two-thirds of the Hearings Panel must rely on the notes and recollection of the one-third who hear the testimony and observe the witnesses.

In this Court's most recent consideration of the right to have credibility determinations based on the personal observations of the fact finder, *United States v. Raddatz*, 447 U.S. 667 (1980), a majority held that there was no denial of due process in having the ultimate finding that a confession was voluntarily given based on the transcript of testimony given before a magistrate, at least when the ultimate decision-maker concurs in the magistrate's findings with respect to credibility. In so holding, however, the Court was very careful to point out the limitations of its decision.

First, it noted that suppression hearings are of a different character than the trial itself and the defendant will have the opportunity, at the trial, to argue before the jury that the confession is not reliable and should be ignored. 447 U.S. at 678. Appellant here gets no second chance before the ultimate decisionmaker.

In distinguishing between the trial and the hearing at issue the Court also stressed that the nature of the suppression hearing

was such that due process was satisfied by a mere preponderance of the evidence. *Id.* at 678. This Court has accorded great significance to the state's own recognition of the importance of interests in liberty, *Paul v. Davis*, 424 U.S. 693 (1976), and here the State of Colorado has itself recognized that the interests implicated demand proof by clear and convincing evidence, a higher standard than that demanded in the suppression hearing in *Raddatz*.

It was further noted in *Raddatz* that the statute in question granted "the judge . . . broad discretion," which "includes hearing the witnesses live to resolve conflicting credibility claims." *Id.* at 680. The Hearings Panel, once the hearing is set for hearing before a Hearings Committee, has no such power to hold a de novo hearing on issues of credibility.

Finally, the majority in *Raddatz* observed that a construction of the Magistrate's Act, the statute at issue, which would permit a district judge to *reject* a magistrate's proposed findings on credibility would pose very different constitutional questions. "[T]o do so [reject the proposed findings] without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." *Id.* at 681 n.7; *see United States v. Hrdlicka*, 520 F.Supp. 403 (W.D. Wis. 1981). Those serious questions are here presented since, as pointed out above, Rule 251 A does indeed explicitly grant the Hearings Panel the authority to "disapprove" the Committee's report, including its findings; and as indicated by the dissent's "CONCURRENCE WITH FINDINGS," the Hearings Panel so construed its authority since the dissenters were not members of the Committee who heard the testimony.

As it was, the due process issue was decided in *Raddatz* by a closely divided Court, four justices dissenting on that question. Given the nature of the interests finally determined under the Colorado procedures here challenged, and the absence of

personal credibility hearing in either a different proceeding or by the ultimate fact finder in this proceeding, unlike the case in *Raddatz*, there is every likelihood that a majority of this Court would find the more stringent demands of *Yamasaki*, requiring a personal hearing before the ultimate decisionmaker, to be constitutionally mandated by the due process clause.

With respect, lastly, to the state's interest in avoiding this right of personal observation by the decisionmaker, it is virtually nonexistent. First, Colorado Rules 249 and 251 A already provide for the Hearings Panel to hear formal hearings at the option of the Grievance Committee's Chairman. Second, the procedure being sought is now in use. There *is* a hearing at which witnesses are personally observed. All appellant seeks is the right to have that hearing attended by all nine members of the Hearings Panel, as opposed to only three. Third, the demands of due process could also be met by eliminating the Hearings Panel as the final decisionmaker, giving the Hearings Committee final authority for determining the facts. This would pose no difficulty or expense to the state whatsoever.

As long as the nine-member Hearings Panel had the authority to disapprove of the findings of the Hearings Committee, that is, the power to find that there was no attorney-client relationship, then appellant herein has been substantially and, more importantly, unconstitutionally prejudiced by Colorado Rules 249 and 251, which precluded two-thirds of the Hearings Panel from observing the witnesses and determining for itself that no such relationship existed.

CONCLUSION

The interests in practicing one's chosen profession are of grave importance and the issue of what procedural protections are afforded by the United States Constitution before this right may

be suspended is also a matter of grave importance which should be addressed and resolved by this Court.

Respectfully submitted,

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APPENDIX A

IN THE

SUPREME COURT OF COLORADO

No. 80SA249

THE PEOPLE OF THE STATE OF COLORADO,
Complainant,

v.

June 22, 1981

PETER S. RAZATOS,
Attorney Respondent.

ORIGINAL PROCEEDINGS IN DISCIPLINE

EN BANC

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JUSTICE LOHR delivered the Opinion of the Court.

In proceedings before a hearing committee of the Grievance Committee of the Supreme Court, Peter S. Razatos, the respondent, was found to have engaged in acts of professional misconduct constituting cause for discipline under C.R.C.P. 241B. The hearing committee has recommended as appropriate discipline that the respondent be suspended from the practice of law for three years, that he make restitution to his client and that he be assessed the costs of the grievance proceedings. A hearing panel of the grievance committee approved the hearing committee's report and recommendations. The respondent filed numerous exceptions to the report of the hearing committee. Our review of the record persuades us that the material findings of fact reflected in that report are supported by clear and convincing evidence and that the recommendations for discipline are appropriate. Accordingly, we adopt those recommendations.

The respondent was admitted to the practice of law in Colorado on September 22, 1941. The conduct upon which these disciplinary proceedings are based took place in connection with the purchase of a bar by Dorothy Lee Smith in 1975. A summary of this complex matter is necessary to an understanding of the nature of the respondent's professional misconduct.

Smith had previously owned and operated bars and knew that the respondent was an attorney and a real estate broker and that he frequently represented parties in the purchase and sale of bars. He had performed legal services for her in 1969. Smith contacted the respondent in the spring of 1975 to see if he knew of any bars for sale. Smith decided not to purchase the first property to which the respondent referred her. Thereafter, upon his recommendation, Smith became interested in the Littleton Lounge and asked him to represent her in the purchase of that business.

The Littleton Lounge was closed at the time Smith became interested in buying it. The respondent told Smith that Apollo

Stereo Music Company (Apollo) and Salem Investment Company (Salem), both of which he represented as an attorney, planned a foreclosure sale of the personal property of the Littleton Lounge and that Smith could purchase the business and personal property free and clear of liens and encumbrances for $39,500. Smith agreed to do so and asked the respondent to represent her in the purchase. She knew that the respondent was the attorney for Apollo and Salem and thought he would be representing those corporations as well as herself.

The respondent prepared a receipt and option contract, which Smith signed,[1] to reflect the agreement. The respondent as "trustee" signed that contract as seller. The purchase price of $39,500 was to be paid $500 in cash and $39,000 by a promissory note (the $39,000 note). Payments to be made on the $39,000 note included monthly installments of $500. Smith also was to pay $8,000 on the $39,000 note upon sale of certain real property owned by her.

The respondent advised Smith that she should have another attorney prepare the documents for formation of a corporation to acquire and operate the business. Upon the respondent's suggestion, Smith engaged Black,[2] a young attorney who shared office space with the respondent, for that purpose. When Black was called into the respondent's office to meet Smith, Black assumed that the respondent was representing her as her lawyer. The respondent and Black had a fee sharing arrangement; the division of fees varied from case to case depending

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[1]The Spigot, Inc., was formed to act as purchaser. Smith signed some of the purchase documents on behalf of the corporation and in some instances also signed them individually. As the distinction between individual and corporate obligations is not of significance to the issues before us, we refer generally to execution of documents by Smith without always specifying whether she signed individually or on behalf of The Spigot, Inc.

[2]A fictitious name.

upon the degree of participation be each in the work performed. Smith did not know what the relationship was between the respondent and Black. Black performed the legal work which resulted in the formation of The Spigot, Inc. and consulted with the respondent concerning the licensing procedure and related matters.

The premises in which the Littleton Lounge was located were owned by the Pollacks. They held a promissory note with an unpaid balance of $9,895 made by a former owner of the lounge based upon the Pollacks' own earlier sale of the lounge. Before the Pollacks would agree to lease the premises to Smith, they required a promissory note in the amount of $9,895, secured by a lien on the fixtures, equipment and other assets to be acquired by Smith. Smith signed such a promissory note (the Pollack note) and security agreement after being assured by the respondent that it constituted part of the obligation to be reflected by the $39,000 note. The Pollack note required monthly payments of $413.72, and the respondent assured Smith that he would make those payments by use of the $500 monthly payments to be made by Smith on the $39,000 note. The Pollacks then leased the Littleton Lounge premises to The Spigot, Inc.

Apollo and Salem are subsidiaries of a common parent corporation. Apollo's business is the placement of cigarette, candy and amusement machines in bars. Salem is in the business of providing financing to bar owners who utilize Apollo's machines. Salem held a $5,874 promissory note from a former owner of the Littleton Lounge based upon such financing. Salem wished to obtain a new note from the purchaser of the lounge. Apollo wished to keep its machines in the lounge when it reopened.

Vechiarelli and others had owned the lounge at one time and held a promissory note in the amount of $22,552, secured by a lien on the physical assets of the lounge, as part of the proceeds of their sale of the lounge. In July of 1975 that note was in

default and collection seemed extremely unlikely if not impossible. The respondent acquired that note based on an agreement to pay $3,000 cash upon Smith's purchase of the lounge, and to assign a $7,000 interest in the $39,000 note to Vechiarelli. The respondent agreed to pay $200 per month on the $7,000 obligation. He did not advise Smith of this transaction or of the Vechiarelli lien.

Prior to the closing on Smith's purchase of the Littleton Lounge, she executed the $9,895 Pollack note. At the closing she executed a $5,874 note to Salem (the Salem note) and the $39,000 note, payable to Apollo at the respondent's office. The $39,000 note was secured by a lien on the fixtures, equipment, and other assets of The Spigot, Inc.,[3] a conditional assignment of a secured promissory note with an unpaid balance of approximately $36,000 and other security. This latter note had been obtained by Smith as part of the sales price of another bar which she had owned earlier.

Although Apollo appeared as seller in the closing documents and payee on the $39,000 note, the only interest of Apollo and Salem in the transaction was in obtaining the new $5,874 promissory note and in keeping Apollo's machines in the lounge. Apollo had agreed with the respondent that he could keep any money he was able to obtain from the sale after applying the amounts necessary to pay creditors and to meet incidental expenses. Thus, the respondent had a financial interest in this transaction. He did not tell Smith of that interest.

All closing documents were prepared by the respondent and reviewed by Black. Although both the respondent and Black

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[3]The hearing committee found that the Salem note was secured by a lien on the machines and other equipment. Although the respondent's challenge to this finding may have some merit, the existence and scope of any such lien are not material.

attended the closing, Black's participation was minimal.

The Pollack note, the Salem note and the $39,000 note contained no cross references reflecting that the obligations represented by the two smaller notes were part of the larger. Smith was left vulnerable to possible negotiation of the notes to persons having no knowledge of the true relationship of the debts reflected thereby, and a consequent increase of her obligation to the sum of the three notes. Although Smith asked the respondent why the $39,000 note was in the full amount notwithstanding the part payments reflected in the other two notes, she received no satisfactory answer.

The property which Smith acquired had an intrinsic value of much less than $39,000, a fact which the respondent knew but did not tell Smith.

After the closing, the respondent could expect to receive $500 per month from Smith on the $39,000 note and was obligated to pay $412.72 per month to the Pollacks and $200 per month to Vechiarelli.

Black and the respondent assisted Smith in obtaining or transferring the liquor license and in meeting legal difficulties resulting from alleged license violatons after the closing. Black charged Smith for those services and split the fees equally with the respondent.

In January of 1976 the respondent negotiated a new loan of $2,500 to Smith from Salem. The original $5,874 Salem note was cancelled, and a new note for the increased loan was executed. The respondent co-signed the new note. The respondent kept the proceeds of the loan and credited Smith with the additional $2,500 as a payment on the $39,000 note. However, the interest rate on the Salem note was 18% in contrast to the 8½% interest rate on the $39,000 note. This was not explained to

Smith. Smith obtained an additional $1,800 for her own use through a similar transaction in August of 1976. The respondent did not co-sign the new note reflecting the increased loan. As a result of the August transaction, the January 1976 note was cancelled, relieving the respondent of personal liability on that note.[4]

After the September 15, 1975 closing, Smith made the required $500 monthly payments except for a four month moratorium period to which the respondent agreed. No moratorium was obtained from the Pollacks. The respondent was frequently late in making the $413.72 monthly payments to the Pollacks and on several occasions did not make them. When payments were not received, the Pollacks complained to Smith; she referred them to the respondent; and the respondent advised the Pollacks that Smith's payments were late or that there was not enough money to go around.

In March of 1977, Black and the respondent terminated their relationship as a result of disagreements. In May of 1977, the respondent advised Smith in writing that he was no longer working on "her case." Black continued to represent Smith and as a result learned for the first time of the relationship of the three promissory notes. Black began to hold Smith's payments on the $39,000 note in his trust account pending a determination of how they should be disbursed, commenced certain litigation, and assisted Smith in initiating the request for investigation which resulted in these disciplinary proceedings.

After failing to receive scheduled payments, the respondent threatened foreclosure on the $39,000 note. He also suggested to the Pollacks that they threaten eviction because of failure of

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[4]The respondent asserts that the net result of the manner in which the $1,800 loan was treated was that the respondent ultimately bore the burden of that obligation. The evidence supports that assertion.

Smith to maintain insurance coverage on the leased premises, and they did so. In the meantime the Vechiarellis, who were not being paid on the respondent's $7,000 obligation, commenced litigation of their own, naming Smith and The Spigot, Inc. among the defendants. The respondent ultimately obtained settlement of this litigation by purchasing the $7,000 obligation from the Vechiarellis.

Smith agreed to sell the lounge business to another, and a closing was scheduled for May of 1978. Before the closing the respondent signed a statement of attorney's lien and caused it to be served on Smith and the prospective purchasers. The lien statement contained a claim for $5,000 in legal fees, based on the respondent's fee-sharing agreement with Black. The respondent had not previously billed Smith for that alleged obligation. Although neither Smith nor Black believed any fees were owed to the respondent, they agreed to pay and did pay the respondent the compromise amount of $2,500 to avoid jeopardizing the sale of the lounge. Thereafter, the sale of the business was completed and the various remaining claims were paid. The respondent had no legal basis for the assertion of a lien to secure a fee obligation even if any such obligation existed. *See* sections 12-5-119 and 120, C.R.S. 1973 (1978 Repl. Vol. 5), which were the asserted authorities for the claimed lien.

The hearing committee found that the respondent did not advise Smith of many of the pertinent matters relating to the transaction because of the respondent's personal financial interest in the sale.

In the proceedings before the hearing committee, the respondent was charged with professional misconduct in four separate counts. We summarize the committee's findings and conclusions with respect to each count individually.[5] The basic finding, from

[5]Some of the charges, such as mishandling of trust funds, were found not to have been established. We do not summarize those charges.

which the conclusion of misconduct flows, is that the relationship between the respondent and Smith in the purchase of the Littleton Lounge was that of attorney and client.

COUNT I

Based on the charges in Count I, the respondent was found to have represented Apollo and Salem, whose interests were adverse to those of Smith, and to have retained a financial interest for himself in the sale, all without complete disclosure to Smith and without having obtained her informed consent. As a result, the hearing committee concluded that the respondent had violated DR5-101 (conflict between personal interests and client's interests), DR5-104 (entering into business transaction with client), DR5-105 (representing differing interests) as well as C.R.C.P. 241B (conduct that violates the code of professional responsibility, accepted rules or standards of legal ethics or the highest standards of honesty, justice or morality).

COUNT II

Count II involves the use of the three promissory notes without protective references reflecting that the smaller obligations were part of, and not additional to, the larger. The hearing committee found that this was done to make it difficult for Smith to understand the transaction and to hide the respondent's profit interest in the transaction. The committee further found that because the combined installments (apparently including the $200 per month which the respondent was to pay toward Vechiarelli's $7,000 interest in the $39,000 note) exceeded the $500 per month which Smith had agreed to pay, she was subjected to harrassment and litigation which caused her mental anguish, and financial detriment in the form of attorney's fees. The committee concluded that these activities violated DR5-101A (conflict between lawyer's interests and client's interests), DR5-105 (representing differing interests), DR6-101(A) (neglect of a legal matter), DR7-101(A)(3) (preju-

dicing or damaging a client during the course of the professional relationship) and C.R.C.P. 241B.

COUNT III

Pursuant to Count III, the respondent was found to have a fiduciary relationship to Smith for the purpose of forwarding the payment of Smith's payments on the $39,000 note as necessary to meet the Pollack payments and was found to have violated that fiduciary responsibility by not making all payments to Pollack as Smith made her payments. Likewise, the respondent undertook the $200 per month Vechiarelli obligation without explaining to Smith that if the respondent did not make the required payments the business assets which Smith was purchasing were vulnerable to foreclosure to satisfy the Vechiarelli lien. By failing to make required payments, the respondent caused Smith to become embroiled in litigation. The committee also found that Smith was further prejudiced by the increased obligation resulting from the $2,500 increase of the Salem note in that the interest rates and monthly payments were increased. The hearing committee also found that the respondent benefited from that transaction. The committee concluded that these activities violated Rule DR1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR5-101(A) (conflict between lawyer's interests and client's interests), DR5-104(A) (entering into business transaction with client), DR7-101(A)(3) (prejudicing or damaging a client during the course of the professional relationship), and C.R.C.P. 241B.

COUNT IV

Finally, based on Count IV, the respondent was found to have asserted an attorney's lien in circumstances where he had no statutory or legal foundation for a lien and had an uncertain claim to the fee on which the purported lien was founded. This conduct was found to have violated DR1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresenta-

tion), DR1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), DR1-102(A)(6) (engaging in conduct adversely reflecting on the attorney's fitness to practice law), and C.R.C.P. 241B.

The hearing committee found all the conduct described to have been established by clear and convincing evidence. *See* C.R.C.P. 251A.

The crux of the respondent's exceptions to the hearing committee's findings and conclusions is his claim that he was acting as a principal and as a broker and was never representing Smith as an attorney in the transactions. The committee found otherwise and our independent review of the record satisfies us that clear and convincing evidence supports the committee's finding.

The relationship of attorney and client is based upon contract; such a contract need not be express but can be implied from the conduct of the parties. *See Turtenbach v. Tekippe,* ____ Iowa ____, 260 N.W.2d. 53 (1977); *7 Am Jur. 2d* Attorneys at Law §118 (1980).

Our review of the record reflects clear and convincing circumstancial evidence that the respondent was acting as Smith's attorney in the bar purchase transaction. That was the understanding of Smith and of the two attorney witnesses, Black and Pollack. Only the respondent testified to the contrary. The conduct of the respondent and Smith was the source of the understanding of Black and Pollack as to the nature of the relationship. Any lingering doubt that the relationship was that of attorney and client is dispelled by the statement of attorney's lien signed by the respondent on April 25, 1978, in which it is stated:

> "That the said attorney's lien is held for and on account of:

> Dorothy Smith, Don Smith and Spigot, Inc. obtained the services of Peter Razatos as their attorney for legal matters, for incorporating and purchase of business, . . . commencing from September 15, 1975 until the present date."

The efforts of the respondent to explain this statement away as a mistake are at best unconvincing. The attorney-client relationship having been established, it follows that the committee was correct in finding the numerous instances and types of professional misconduct summarized above.

We have considered all the exceptions of the respondent to the hearing committee's report and find them either without merit or directed to factual findings not material to the case.

The hearing committee recommended, and the majority of the hearing panel agreed, that a three-year suspension of the respondent's license to practice law and restitution of the $2,500 extracted from Smith by use of the purported attorney's lien would constitute appropriate discipline. The respondent has previously received a letter of reprimand from the Denver Bar Association Grievance Committee in 1966 and a letter of admonition from the Supreme Court Grievance Committee in 1971.

We have detailed the considerations relevant to lawyer discipline in other cases and will not repeat them here. *See, e.g., People v. Berge*, ____ Colo. ____, ____ P.2d ____ (1980). The misconduct which gave rise to the present proceedings was grievous, demonstrates insensitivity to the professional obligations of a lawyer and necessitates a severe sanction to reflect the gravity of the respondent's breach of ethical standards and to protect the public from future unprofessional conduct of this kind. Accordingly, we adopt the recommendation of the committee.[6]

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[6]We note that one member of the hearing panel wrote a separate recommendation strongly recommending disbarment.

We order that Peter S. Razatos be suspended from the practice of law in the State of Colorado; that he comply with C.R.C.P. 255 within thirty days after the issuance of this opinion; that he not be permitted to apply for reinstatement for at least 3 years from the effective date of his suspension; and that before he will be reinstated he must demonstrate that he has complied with all applicable reinstatement rules and that he then possesses the requisite qualifications for readmission to the practice of law in Colorado.

It is further ordered that within 90 days of this order the respondent reimburse his former client Smith the sum of $2,500 plus interest at the legal rate from May 11, 1978[7] to the date of payment, without prejudice to the respondent's right to assert a claim for any unpaid share of legal fees owed to him by Black under their fee sharing arrangement.

It is further ordered that the respondent pay the costs of this disciplinary proceeding in the sum of $692.65 within 90 days from the date of this order.

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[7]The date of sale of the lounge by Smith and payment of the fee to the respondent.

APPENDIX B

SUPREME COURT, STATE OF COLORADO

Case No. 80SA249
ORIGINAL PROCEEDING IN DISCIPLINE

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

vs.

PETER S. RAZATOS,

Respondent.

ORDER

Upon consideration of the Petitions for Rehearing filed by the Respondent in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions for Rehearing shall be, and the same hereby are Denied.

BY THE COURT, EN BANC, AUGUST 6, 1981.

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APPENDIX C

In the Supreme Court of the State of Colorado

No. 80-SA-249

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

vs.

PETER S. RAZATOS
Attorney-Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Peter S. Razatos, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Colorado, denying his Petition and Amended Petition for Rehearing, entered in this action on August 6, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2) (1970).

Jonathon B. Chase #1980

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